NO.

325

LIBRARY
SUPREME COURT, U.S.

Office - Suprem
FIL
JUL 3
JOHN T. F

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 325

In the Matter of:
INLAND GAS CORPORATION, *Debtor.*

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, *Debtor.*

In the Matter of:
AMERICAN FUEL & POWER CO., et al., *Debtors.*

In Bankruptcy

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitio

vs.

COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and BEN WILLIAMSON, JR., as Trustee of KENTUCKY FUEL GAS CORPORATION, et al.,
Respona

PETITION OF VANSTON COMMITTEE REPRESENTIN FIRST MORTGAGE BONDS OF KENTUCKY FUEL GA CORPORATION FOR WRIT OF CERTIORARI TO UNITE STATES COURT OF APPEALS FOR THE SIXTH CIRCU

MILBANK, TWEED, HOPE & HADLEY,
Of Counsel.

GEORGE W. JAQUES,
Counsel for Petition Bondholders Comm
15 Broad Street,
New York 5, N.

Dated: July 29, 1957

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented for Review	2
Statutes Involved	2
Statement of Case	3
Reasons for Granting the Writ	8
(a) The equity arising from Columbia's wrongful acts	8
(b) The conflicting views in the Court below	9
(c) Conflicting holdings by Courts of Appeal	13
Conclusion	14
Appendix:	
A. Order of District Court	1a
B. Opinion Below	5a
C. Judgment Below	29a
D. Order Denying Rehearing	30a
E. Balance Sheet and Earning Statement of Inland Gas Corporation as of June 30, 1957	32a

CITATIONS

Cases

PAGE

In re American Fuel & Power Co., (C. A. 6th Ky.) 122 F. 2d 223 ..... 6, 7

In re American Fuel & Power Co. (1945) 151 F. 2d 470 10

City of New York *v.* Saper (1949), 336 U. S. 328, 93 L.Ed. 710, 69 S.Ct. 554 ..... 9, 12

Columbia Gas and Electric Corporation *v.* United States, et al., (1945) 151 F. 2d 461, Cert. den. 329 U. S. 737, 91 L.Ed. 636, 67 S.Ct. 48 (1946) .. 6

Consolidated Rock Products Co. *v.* Du Bois (1940) 312 U. S. 510, 85 L.Ed. 982, 61 S.Ct. 675 8

In re Deep Rock Oil Corp., 113 F. 2d 266, C. A. 10th cert. denied, 311 U. S. 699 ..... 11, 12, 13

In re Inland Gas Corporation (1951), 187 F. 2d 813 ..... 7, 8

In re Inland Gas Corporation (1954) 211 F. 2d 381 7

Sexton *v.* Dreyfus (1911) 219 U. S. 339, 55 L.Ed. 244, 31 S.Ct. 256 ..... 9, 10

Taylor *v.* Standard Gas & Electric Company (1939) 306 U. S. 307, 83 L.Ed. 669, 59 S.Ct. 543 ..... 12, 13

Vanston *v.* Green (1946) 329 U. S. 156, 91 L.Ed. 162, 67 S.Ct. 237 10

STATUTES:

Sherman Act Sections 1 and 2, 26 Stat. 209 as amended 50 Stat. 693 (15 U.S.C. §§1 and 2) .. 2

28 U.S.C. Section 1254 2

PAGE

Bankruptcy Act, 52 Stat. 840, 11 U.S.C. 1, et seq:

Section 47c 2
Section 57n 3, 10
Section 63 ..... 3, 10
Section 64 ..... 3, 10
Section 102 ..... 3, 10
Section 106 ..... 3, 10
Section 200 ..... 3, 10
Section 216 ..... 3, 10

Record References

Petitioner has not filed a transcript of the record in this cause, but, in lieu thereof, a certified copy of the appendices filed by all parties below, has been filed as permitted by paragraph 3 of Rule 21 of the Rules of this Court. Accordingly, all citations to the record of this cause are to the various appendices filed below or herewith, which are identified by the party filing the same.

App.—Appendix to this petition.

Tr. App.—Appendix of Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation—the second appendix in the Certified Record.

Allen App.—Appendix of Allen Committee and Edward D. Spilman, Representing Stockholders of American Fuel & Power Company—the fourth appendix in the Certified Record.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

In the Matter of:
INLAND GAS CORPORATION, *Debtor.*

In the Matter of:
KENTUCKY FUEL GAS CORPORATION, *Debtor.*

In the Matter of:
AMERICAN FUEL & POWER CO., et al., *Debtors.*

} In Bankruptcy

VANSTON BONDHOLDERS PROTECTIVE COMMITTEE,
Petitioner,

vs.

COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and BEN WILLIAMSON, JR., as Trustee of KENTUCKY FUEL GAS CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, the Vanston Protective Committee, representing holders of First Mortgage Bonds of

Kentucky Fuel Gas Corporation respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review the order and judgment of that Court rendered in the above cause, affirming an order of the District Court of the United States for the Eastern District of Kentucky.

The Opinions of the Court Below

The District Court did not write an opinion but entered an order which is included in the record and is appended hereto (App., p. 1a). The opinions of the Court of Appeals for the Sixth Circuit, one judge dissenting, are reported at 241 F. 2d 374 and are appended hereto (App., pp. 5a, 19a and 23a).

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and 11 U.S.C. Section 47(c). The date of the judgment of the Court of Appeals is February 14, 1957, and it was entered on that day (App., p. 29a). The date of the order of that Court denying rehearing of the matter is May 8, 1957 and it was entered on that day (App., p. 30a).

Question Presented for Review

Whether the Court of Appeals erred in refusing to allow interest on the publicly held bonds and debentures of Kentucky Fuel Gas Corporation for the period subsequent to the date of bankruptcy.

Statutes Involved

The Sherman Act Sections 1 and 2, 26 Stat. 209 as amended 50 Stat. 693 (15 U.S.C. §§ 1 and 2).

The following sections of the Bankruptcy Act: Section 57n (11 U.S.C. § 93n), Section 63 (11 U.S.C. § 103), Section 64 (11 U.S.C. § 104), Section 102 (11 U.S.C. § 502), Section 106 (11 U.S.C. § 506), Section 200 (11 U.S.C. § 600), Section 216 (11 U.S.C. § 616).

Statement

The question presented relates to the validity of a provision of a reorganization plan, in a proceeding under Chapter X of the Bankruptcy Act, providing for the payment of post-bankruptcy interest on the publicly held funded debt of Kentucky Fuel Gas Corporation. The Court below disallowed such interest.

This corporation and Inland Gas Corporation as well as American Fuel & Power Co., their controlling stockholder, were in 1930 producers of natural gas in Kentucky. A large part of their securities, including a majority of the outstanding shares of American, were owned by a syndicate consisting of Hope Engineering Company and others. This syndicate during 1930 had acquired options on part of a right of way for a pipe line whereby gas produced by these companies would have access to Detroit and it had also procured contracts for the sale of approximately 19,000,000 cubic feet of gas per day in the Detroit area. At that time the Columbia Gas and Electric Corporation, now the Columbia Gas System, was engaged in the business of producing, transporting and distributing natural gas in Indiana, Ohio, Kentucky, Pennsylvania and New York and controlled through its subsidiaries one-fourth of the total mileage of the natural gas pipe lines operating within the United States. Columbia learned of the efforts of the three companies

to obtain the Detroit business. It made a detailed investigation of the financial condition and the gas reserves of the American Fuel & Power Co. and its subsidiaries, which showed an unfavorable financial status. Shortly thereafter one of Columbia's vice-presidents stated that the contemplated construction of additional gas pipe lines by American and its subsidiaries in Ohio constituted an improper invasion of Columbia's territory, and when the three corporations commenced their expansion into the state of Ohio, the same vice-president stated that his company would not stand idly by and permit the construction of competing natural gas pipe lines across that state. In January, 1930, Columbia began to purchase in the open market bonds of the Kentucky Fuel and Inland Gas corporations, and by May 30th of that year had acquired over 27% of the bonds of each company. By the end of October or early November, 1930, Columbia had acquired all the interest of the syndicate in the American company and its subsidiaries for $2,870,700, which price exceeded the syndicate's original investment by $350,000. Columbia also agreed to hold harmless the syndicate from any claim American or its subsidiaries might have against the syndicate for breach of its agreement to provide funds to enable the Inland and Kentucky Fuel companies to make certain sinking fund payments. The Hope Company had a contract with American and its subsidiaries to supervise the construction of their pipe lines to Detroit at an estimated cost of $20,000,000, for which services it was to receive 4% of the cost. Shortly after Columbia bought out the syndicate it made an agreement with Hope for the supervision of $20,000,000 of other construction work for which Hope was to

receive a fee of 4% of the cost. Later, Columbia paid Hope $453,000 for cancellation of this contract.

After Columbia had acquired the interest of the syndicate, it made additional purchases increasing its total investment in American Fuel and its subsidiaries to over $6,300,000. When Columbia acquired these securities the three companies had the prospects that would arise from the completion of the gas lines to Detroit.

At about the same time Columbia took steps to reach the Detroit market by extending its own lines.

Columbia after its purchases removed the directors and officers of the American Fuel & Power Co. and its subsidiaries and replaced them with its own nominees, with the exception of the individual who was president of both the Inland and Kentucky Fuel companies who was continued in office. Sinking fund payments on the bonds and debentures of the respective companies were discontinued.

Within thirty days after Columbia obtained control of American and its subsidiaries, it caused Williams and Gibson, a partnership drilling gas wells for Inland, to institute creditors' suits in the United States District Court for the appointment of equity receivers for the Inland and Kentucky Fuel companies. On December 1, 1930, the directors of these corporations passed resolutions consenting to the appointment of receivers and on December 2, 1930, when Williams and Gibson filed their suits, the corporations entered their appearance in the actions and consented to the appointment as receiver of W. E. Lockhart, their joint president. The insolvency proceedings have continued and are now under Chapter X of the Bankruptcy Act.

Before Williams and Gibson instituted their actions, Columbia caused one of its subsidiaries to promise to pay their claims in full on completion of the work undertaken by them, which was done.

The above statement regarding Columbia's activities is derived from *In Re American Fuel & Power Co.*, (C.A. 6th Ky.) 122 F. 2d 223, 225, 226.

The Court after considering the facts said:

> "The facts in the record impel the conclusion of this court that Columbia's conduct was for the purpose of destroying the debtors and their subsidiaries, and that by its acts, it drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities and now, under the terms of the settlement approved by the lower court, is to have a share of the skeleton. (p. 228)
>
> * * * * *
>
> "Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show." (p. 229)

Other sections of the opinion from which we have briefly quoted, give further detail as to Columbia's plot. Columbia, however, was not a party to that appeal.

Subsequently the wrongful acts of Columbia with respect to the three corporations were the subject of an opinion in an anti-trust suit against it, *Columbia Gas and Electric Corporation* v. *United States, et al.*, (1945) 151 F. 2d 461, Cert. den. 329 U. S. 737, 91 L. Ed. 636, 67 S.Ct. 48 (1946) and further factual detail is given. It seems its president had declared that "if any one thinks Columbia will allow a ditch to be dug

across the State of Ohio, he is just crazy," and that if Columbia came into the picture it would have to "put the company [American Fuel] through the wringer."

The Appellate Court sustained the finding of the trial court that Columbia, its executive officers and others, were engaged in a conspiracy the purpose and effect of which was to restrain and monopolize trade and commerce in natural gas and that it had acquired the securities of American and its subsidiaries pursuant to and in accomplishment of that conspiracy. The Court in *American Fuel & Power Co., supra*, the earlier case, had ordered that all claims and stock interest of Columbia should be rejected and Columbia take nothing thereby. The later case subordinated Columbia's claims to "the claims of all other creditors of every class".

This holding regarding subordination was later interpreted to mean that all publicly held debt of American, Inland and Kentucky Fuel ranked ahead of all claims of Columbia against any of these three companies. *In re Inland Gas Corporation* (1951) 187 F. 2d 813, 816, 817; (1954) 211 F. 2d 381, 383. At the time these later decisions were rendered all creditors of Inland, other than Columbia, had been paid or provided for and the status of the publicly held securities of American and Kentucky was under consideration.

It was because of the interrelations of American and its two subsidiaries, amounting almost to complete integration of their activities, that the court thus decided in favor of their public creditors.*

* American owns 72.6% and Kentucky Fuel 26% of Inland stock. 1.4% is held by the public. These opinions, as an initial step in determining the subordination, found that the public creditors of American and Kentucky Fuel had creditors' status in relation to Inland's surplus assets and that they shared therein in the proportion of 72.6 and 26 respectively.

Reasons for Granting the Writ

(*a*) The equity arising from Columbia's wrongful acts.

We consider that in view of the nature of Columbia's illegal acts, the subordination must necessarily be a *total* subordination of all Columbia's claims, i.e., Columbia is to gain nothing at the expense of the publicly held debt of the three companies.† To us the subordination of Columbia's claims was ordered rather than complete rejection, so that, if, after the publicly held claims were made whole, anything remained this remainder would go to the "tainted" securities held by it. See the lower court's opinion in 187 F.2d 813, 815.

The primary wrong done by Columbia was one regarding *income*. The plot was not so much to destroy the principal of the publicly held securities of Kentucky Fuel as to deprive their holders of a basic right and expectation, i.e., to have the earnings from the potentially lucrative Detroit area applied to interest rightfully becoming due and thereafter to have the claim for principal liquidated. The equity thus created naturally requires the *restoration of income* out of the earnings of Inland now available. Columbia being controlling stockholder its claim for interest should not be "insulated" and protected. *Consolidated Rock Products Co.* v. *Du Bois* (1940) 312 U. S. 510, 523, 85 L.Ed. 982, 992, 61 S.Ct. 675.

The principal amount of the publicly held bonds of Kentucky Fuel as of July 31, 1955 was $2,236,600 and the unpaid interest at that date was $3,256,100. The

† The Securities and Exchange Commission, to which the Plan in the instant case had been referred by the District Judge, adopted the same view.

principal amount of the publicly held Kentucky Fuel Debentures on that date was $542,000 and the interest due was $886,600. (p. 5 of the Plan before the court below, p. 58-A, Allen App.) If this interest is not paid according to the equities of the case, Columbia under the decision below receives it. It will then not only have accomplished its purpose but will have also received a goodly percentage of the money it laid out.

(*b*) The conflicting views in the court below.

The opinion below denying post-bankruptcy interest (one judge dissenting) held that *The City of New York* v. *Saper* (1949) 336 U. S. 328, 93 L.Ed. 710, 69 S.Ct. 554, prevailed over the equitable right of the publicly held Kentucky Fuel funded debt to receive post-bankruptcy interest.

The *Saper* case, denying post-bankruptcy interest on a tax claim, seems to us to enunciate a rule of convenience based historically on cases in which no reorganization in the modern sense was ever contemplated, and in which, by reason of complete and irretrievable insolvency, a "winding up" should in all justice occur immediately upon the occurrence of bankruptcy.

In discussing the question of allowing interest on unsecured debts in bankruptcy proceedings Mr. Justice Holmes in *Sexton* v. *Dreyfus* (1911) 219 U. S. 339, 55 L.Ed. 244, 31 S.Ct. 256, an opinion much relied on in the *Saper* case, says:

> "The rule is not unreasonable when closely considered. It simply fixes the moment when the affairs of the bankrupt are supposed to be wound up. If, as in a well known illustration of Chief Justice Shaw's, *Parks* v. *Boston*, 15 Pick. 198, 208, the whole matter could be settled in a day by a

> pie-powder court, the secured creditor would be called upon to sell or have his security valued on the spot, would receive a dividend upon that footing, would suffer no injustice, and could not complain." (pp. 344-5)

A "pie-powder" court would seem out of place in a Chapter X proceeding.

When *Sexton* v. *Dreyfus*, *supra*, was decided, Chapter X of the Bankruptcy Act, dealing with corporate reorganizations, was non-existent. In view of certain sections of Chapter X, such as Section 102 (11 U.S.C. § 502), Section 106 (1) and (4)) (11 U.S.C. § 506 (1) and (4)), Section 200 (11 U.S.C. § 600) and Section 216 (1) and (14) (11 U.S.C. § 616 (1) and (14)), it seems that various sections of the older law, such as Section 57 n (11 U.S.C. § 93 n) Section 63 (11 U.S.C. § 103) and Section 64 (11 U.S.C. § 104) should not be rigid rules. Section 102, *supra*, especially recognizes this distinction. Furthermore, no order under Section 102, applying Chapters I to VII of the Bankruptcy Act, has been entered herein.

The minority opinion below seems to reach the heart of the problem. It quoted with approval from *Vanston* v. *Green** (1946) 329 U. S. 156, 91 L.Ed. 162, 67 S.Ct. 237 and other authorities as follows:

> **"Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. 'It is manifest,' said Mr. Justice Black, for the majority, in Vanston Bondholders**

* The Vanston Committee, petitioner, became a party to the Inland and Kentucky Fuel proceedings shortly after their inception and *Vanston* v. *Green*, *supra*, resulted from an appeal on the question of interest on interest, which had arisen in *In re American Fuel & Power Co.* (1945) 151 F. 2d 470.

Protective Committee v. Green, 329 U. S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, 'that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor.' It is clear to the writer * * * that, as said in Sampsell, 313 U. S. at page 219, 61 S.Ct. at page 907, 'The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete,' and the further observation that 'To bring himself outside of that rule* an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice.' That such burden is fully borne here and by our earlier decisions amply demonstrated." (App., pp. 15a and 16a)

As we read the majority opinion below, we think the following quotations represent its basic holding:

"* * * For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors."

"Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied." (App., p. 20a)

* * *

"*In re Deep Rock Oil Corp.*, 10 Cir., 113 F. 2d 266, certiorari denied *Standard Gas & Electric Co. v. Taylor*, 311 U. S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention." (App., p. 23a)

* Presumably equality of distribution among unsecured creditors.

The *Deep Rock* case, above cited, is not, in our view, in any way over-ruled by the *Saper* case. Also, the *Deep Rock* case dealt with an equity somewhat similar to the one here involved whereas the *Saper* case was devoted mainly to the ranking of claims and did not discuss any of the equitable principles enunciated in the *Deep Rock* case, or the earlier case of like purport, *Taylor* v. *Standard Gas & Electric Company* (1939), 306 U.S. 307, 83 L.Ed. 669, 59 S.Ct. 543.

The instant litigation should be decided on the strength of the equity involved rather than, if we may so express it, on the strength of a barrier derived from decisions, such as the *Saper* case, not involving any such equity.

Furthermore, as we see it, this barrier has already been pierced in the instant case. The Court below has held that the debt claim for the principal of the publicly held Kentucky Fuel Bonds and Debentures has an equity in its favor which is so strong that it cuts through the barrier consisting of the debt claim of Columbia for principal.

After examining the Balance Sheet and Earning Statement published by the Inland Trustee as of June 30, 1957*, we believe that if Inland's present assets were distributed to its present creditors, in the order provided in the Plan before the lower court, they would come within approximately $750,000 of liquidating the amounts due for principal and interest to date on the

---

* This document is annexed as Appendix E, p. 32a, and we trust properly so.

publicly held Bonds and Debentures of Kentucky Fuel.*

In arriving at the above figure we have not taken into account increases in value due to (1) the recent general rise in prices, (2) the able management of the bankruptcy Trustee and (3) the full results of the favorable contract, mentioned in the Plan, which he negotiated in October, 1955 with Tennessee Gas Transmission Company to supply Inland with 38,000,000 cubic feet of gas per day until October 1, 1971. These increases are probably sufficient to make up the above deficiency of approximately $750,000. In the meantime Inland is earning, after ordinary income taxes, over $800,000 a year.

(c) Conflicting holdings by Courts of Appeal.

Aside from the equities in the present case, we consider that *In re Deep Rock Oil Corp.*, (C. C. A. 10th) *supra*, supports the minority opinion below. We respectfully submit that the majority opinion in the lower court in noting that this case "lends some support to appellants' contention" fails to recognize that the Court of Appeals for the Tenth Circuit would doubtless decide the instant case so as to uphold such contention. *In re Deep Rock Oil Corp., supra*, confirmed a plan following the earlier Supreme Court opinion, in that case, *Taylor* v. *Standard Gas & Electric Company*,

* We derive the figure by (1) using the appraisal of the Inland properties made as of October 1, 1955, mentioned in the Plan, (2) using the figures shown in Appendix E to recast Exhibit J and the related schedules of the Plan and (3) allowing for reorganization expenses paid in the first half of 1957, and noting that Inland has among its current assets cash and U. S. Treasury Notes of approximately $3,140,000, which until the recent advance in rates on government securities earned very little income. (See pp. 58a, 62a, and 80a, Allen App.)

supra. The opinion confirming the plan dealt with the following claims against Deep Rock: $10,000,000 principal amount of publicly held notes, $5,000,000 par amount of publicly held preferred stock and a large debt claim held by Standard Gas & Electric Company. The opinion of the Supreme Court was construed to mean that interest should be paid on the publicly held notes even though Standard's debt claim was subordinate to the notes and preferred stock. As a result, Standard was allowed no participation in the Deep Rock assets.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MILBANK, TWEED, HOPE & HADLEY
Of Counsel

GEORGE W. JAQUES,
Counsel for Petitioning Bondholders Committee
15 Broad Street
New York 5, N. Y.

July 29, 1957.

APPENDIX A.

Order of H. Church Ford, U. S. D. C. J., dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit.

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by Counsel for said Clinton M. Harbison, Trustee as aforesaid, and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax ques-

tion raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, and hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. Thereupon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous

in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and the same is hereby dismissed and confirmation of said plan is denied.

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies

of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956

Enter:

(s) H. Church Ford
Judge

APPENDIX B.

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957.

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtors.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas &

Electric Corporation v. United States, 6 Cir., 151 F.2d 461, modification denied, 6 Cir., 153 F.2d 101, certiorari denied 329 U.S. 737, 67 S.Ct. 48, 91 L.Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F.2d 813; In re Inland Gas Corporation, 6 Cir., 208 F.2d 13; In re Inland Gas Corporation, 6 Cir., 211 F.2d 381, certiorari denied Kern v. Williamson, 348 U.S. 840, 75 S.Ct. 45, 99 L.Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F.2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets

of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,492,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government

is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corpora-

tion from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed" so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for

a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U.S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954; 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re. American Fuel & Power Co., 6 Cir., 151 F.2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F.2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland

stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr.

Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S.Ct. 237, 241, 91 L.Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F.2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 618, 59 S.Ct. 543, 83 L.Ed. 669, that, as said in Sampsell, 313 U.S. at page 219, 61 S.Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F.2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation,

for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debentures ask us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on

the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12855, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 163, 67 S.Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the

obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F.2d 199, 200. A denial of this right is in substance

a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X. United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v.

Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied 348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F.2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E.2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called

for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual con-

troversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court

sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words, "except with respect to Federal taxes" upon which this issue turns were not a part of the original

statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori,* an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for

the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bank-

ruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
No. 12,861

Ben Williamson, Jr., Trustee of Inland Gas Corporation, and
Kentucky Fuel Gas Corporation, - - Appellants,

v.

Securities and Exchange Commission, - Appellee.

ORDER.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Charles C. Simons
Chief Judge

Filed
February 14, 1957
Carl W. Reuss, Clerk

A True Copy
Attest:
Carl W. Reuss, Clerk
By Grace Keller
Deputy Clerk

(Seal)

APPENDIX D.

COPY

Nos. 12,861-12,867

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
May 8 — 1957
CARL W. REUSS,
Clerk

In the Matter of
INLAND GAS CORPORATION,
Debtor,
In the Matter of
KENTUCKY FUEL GAS CORPORATION,
Debtor,
In the Matter of
AMERICAN FUEL & POWER COMPANY,
Debtor.

ORDER

Before:
SIMONS, Chief Judge,
MARTIN and MILLER, Circuit Judges.

The petitions for rehearing with requests for further oral argument en banc, filed herein by The Vanston Committee for Kentucky Fuel Gas Corporation First Mortgage Bonds, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation, and Paul E. Kern, having been considered by the Court;

And the Court adhering to the views previously expressed in its opinion of February 14, 1957, and in conformity with its rule with respect to hearings en

banc on petitions for rehearing; *N.L.R.B.* v. *Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc.* v. *Glenn L. Martin Co.*; 229 F. (2) 434, C. A. 6th;

It Is Ordered that the petitions for rehearing and requests for further oral argument en banc be denied.

Approved for entry:

/s/ Shackelford Miller, Jr.
U. S. Circuit Judge

Simons, Chief Judge, dissenting. While I agree with that part of the order in the above causes which rejects the suggestion contained in the petitions for rehearing therein by the full membership of the court sitting en banc, contrary to our practice, I am of the opinion that the petitions for rehearing on the subject of post-bankruptcy interest should be granted, for the reasons developed in my original opinion in the case.

APPENDIX E.

INLAND GAS CORPORATION
(INCORPORATED)
BEN WILLIAMSON, JR., TRUSTEE
ASHLAND, KENTUCKY

July 15, 1957

TO THE CREDITORS OF
KENTUCKY FUEL GAS CORPORATION:

Enclosed you will find comparative Balance Sheet of the Inland Gas Corporation as of June 30, 1957, and comparative Statement of Earnings for the six months ended June 30, 1957.

The purpose in sending the Inland statement to you is that Kentucky Fuel creditors, by virtue of their stock ownership, have a vital interest in Inland's operations.

BEN WILLIAMSON, JR., TRUSTEE
INLAND GAS CORPORATION

BEN WILLIAMSON, JR., TRUSTEE
KENTUCKY FUEL GAS CORPORATION

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE BALANCE SHEET AS OF JUNE 30, 1957

Assets and Other Debits	At June 30, 1957	At December 31, 1956	Increase or *Decrease*
CURRENT ASSETS:			
Cash	$1,552,635.38	$1,649,905.49	$502,729.89
United States Treasury Notes	1,591,546.88	1,500,000.00	91,546.88
Accounts Receivable — Customers	481,073.58	519,886.91	*38,813.33*
Accounts Receivable — Others	8,562.42	9,720.58	*1,158.16*
Accounts Receivable — Associated Companies	75,919.54	56,673.44	19,246.10
Interest Receivable	1,657.46	12,578.12	*10,920.66*
Prepayments	32,585.54	32,305.10	280.44
Materials and Supplies	226,495.78	207,941.11	18,554.67
TOTAL CURRENT ASSETS	$3,970,476.58	$3,389,010.75	$581,465.83
FIXED ASSETS:			
Gas Plant	$8,711,958.96	$8,623,713.59	$ 88,245.37
Less: Accrued Depreciation, Depletion and Amortization	5,734,508.70	5,604,307.65	130,201.05
	$2,977,450.26	$3,019,405.94	*$ 41,955.68*
Construction Work in Progress	69,940.12	24,898.89	45,041.23
TOTAL FIXED ASSETS	$3,047,390.38	$3,044,304.83	$ 3,085.55
TOTAL CURRENT AND FIXED ASSETS	$7,017,866.96	$6,433,315.58	$584,551.38
OTHER ASSETS:			
Investments in and claims against companies in bankruptcy:			
Investments	$ 38,500.00	$ 38,500.00	$ —0—
Claims	35,167.58	35,167.58	—0—
	$ 73,667.58	$ 73,667.58	$ —0—
Miscellaneous Intangible Capital	850,437.00	850,437.00	—0—
TOTAL OTHER ASSETS	$ 924,104.58	$ 924,104.58	$ —0—
Deferred Charges	$ 5,627.48	$ 12,573.37	*$ 6,945.89*
TOTAL ASSETS AND OTHER DEBITS	$7,947,599.02	$7,369,993.53	$577,605.49

(Italics denote negative amounts)

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE BALANCE SHEET AS OF JUNE 30, 1957

Liabilities and Other Credits	At June 30, 1957	At December 31, 1956	Increase or *Decrease*
CURRENT LIABILITIES:			
Accounts Payable	$ *369,116.24*	$ 389,809.64	$ *20,693.40*
Accounts Payable — Associated Companies	*222.96*	394.32	*171.36*
Customers' Deposits	82.73	82.73	—0—
Accrued Taxes (other than Income)	87,006.31	4,309.00	82,697.31
Accrued Taxes on Income (Estimated)	200,000.00	168,000.00	32,000.00
Other Current and Accrued Liabilities	14,950.81	10,331.48	4,619.33
TOTAL CURRENT LIABILITIES	$ 671,379.05	$ 572,927.17	$ 98,451.88
OTHER LIABILITIES	$ 131,418.23	$ 119,622.59	$ 11,795.64
GENERAL CREDITORS' CLAIMS	$ 952,464.31	$ 941,568.73	$ 10,895.58
CLAIMS OF COLUMBIA GAS AND ELECTRIC CORPORATION subordinated "to the claims of all other creditors of every class" by order of the United States Circuit Court of Appeals, Sixth Circuit, in the case of Columbia Gas and Electric Corporation v. U. S., et al., 151 F. (2d) 461	$5,719,089.04	$5,648,626.12	$ 70,462.92
COMMON STOCK	$2,126,587.00	$2,126,587.00	$ —0—
EARNED SURPLUS	*$1,653,338.61*	*$2,039,338.08*	$385,999.47
TOTAL LIABILITIES AND OTHER CREDITS	*$7,947,599.02*	*$7,369,993.53*	$577,605.49

(Italics denote negative amounts)

* * * * * * * * * *

STATUS PENSION PLAN II

Full Amount Paid	*Less Amortization*	*Unamortized Balance*
Kentucky Trust Company, Trustee		
$84,890.00	$48,104.56	$36,785.44

BEN WILLIAMSON, JR., TRUSTEE

INLAND GAS CORPORATION

(COMBINING ACCOUNTS OF CORPORATION AND TRUSTEE)

COMPARATIVE STATEMENT OF EARNINGS

	Six Months Ended		Increase or *Decrease*
	June 30, 1957	June 30, 1956	
GROSS REVENUES:			
Gas — Industrial	$3,094,069.50	$3,054,587.26	*$ 50,517.76*
— Wholesale	1,468.40	1,275.60	192.80
— Sales to Associated Companies	*208,776.04*	*217,013.21*	*8,237.17*
— Other	28,384.12	*28,633.15*	*249.03*
	$3,242,698.06	$3,301,509.22	*$ 58,811.16*
Miscellaneous	5,168.92	5,473.88	*304.96*
TOTAL REVENUE	$3,247,866.98	$3,306,983.10	*$ 59,116.12*
OPERATING EXPENSES:			
Gas Purchased — Associated Companies	$ 2,172.48	$ 2,370.84	*$ 198.36*
— Other	1,965,698.05	*2,059,200.08*	*93,502.03*
TOTAL GAS PURCHASED	$1,967,870.53	$2,061,570.92	*$ 93,700.39*
Operation	321,185.45	304,199.53	16,985.92
Maintenance	40,286.90	36,776.78	3,510.12
Depreciation, Depletion and Amortization	130,387.68	120,117.66	10,270.02
Taxes (other than Income)	96,427.83	92,175.48	4,252.35
TOTAL OPERATING EXPENSES	$2,556,158.39	$2,614,840.37	*$ 58,681.98*
NET OPERATINC REVENUE	$ 691,708.59	$ 692,142.73	*$ 434.14*
OTHER INCOME	5,660.73	23.55	5,637.18
GROSS INCOME	$ 697,369.32	$ 692,166.28	$ 5,203.04
Other Interest	81,358.50	81,358.50	—0—
NET INCOME (before Taxes)	$ 616,010.82	$ 610,807.78	$ 5,203.04
Taxes on Income (Estimated)	200,000.00	200,000.00	—0—
NET INCOME	$ 416,010.82	$ 410,807.78	$ 5,204.04

(Italics denote negative amounts)